Discussion Paper:

A review of Labour Relations in British Columbia

BRITISH COLUMBIA

Ministry of Skills Development and Labour

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Discussion Paper:
A review of Labour Relations in British Columbia:

Following the provincial election in the spring of 2001, government received various submissions on the need to review and possibly amend the *Labour Relations Code*.

Government committed in the throne speech to consult with British Columbians on changes needed to improve the labour code, to provide greater flexibility, fairness and efficiency for employers and employees alike. Government is interested in reviewing suggestions for Labour Code changes that will revitalize our economy by improving job creation and competitiveness.

In December 2001, discussions began with the B.C. Business Council, the Coalition of B.C. Businesses, the Independent Contractors and Businesses Association and the British Columbia Federation of Labour concerning their respective interest in Code changes and the means for discussing suggested changes.

The B.C. Business Council brought forth suggested changes on behalf of certain businesses. The Coalition of B.C. Businesses and the ICBA have also suggested changes on behalf of their members.

The labour federation asked that a committee of special advisers be established under Section 3 of the code to review any such changes. Lawyers and other employer organizations have also suggested changes.

This discussion paper contains those suggestions and constitutes a formal request for comment from stakeholders and interested parties. Additional suggestions for change may also be submitted.

One suggested change has not been included. Government has been repeatedly asked to delete or at least amend Section 68 – Replacement Workers. Government has made it clear that the replacement worker section of the Code would not be amended.

Submissions must be received by April 11. Written submissions can be sent to:

Ministry of Skills Development and Labour,
Policy and Legislation Branch
PO Box 9591, Stn Prov Govt, Victoria V8W9K4

Facsimile: 250 356-5335
Email: Labour.Ministry@gems2.gov.bc.ca

More information is available at www.labour.gov.bc.ca/lrcreview on the Internet.

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A review of Labour Relations in British Columbia: March 2002

Contents

1.	Definition of Picketing	1
2.	Definition of Manager	2
3.	Purpose of the Code (Section 2)	3
4.	Review of the Code (Section 3)	4
5.	Right to Communicate (Section 8)	5
6.	Duty of Fair Representation Complaints (Sections 12 & 13)	6
7.	Revocation of Bargaining Rights (Section 33)	7
8.	Successorship Rights (Section 35)	7
9.	Essential Service Designation (Section 72)	8
10.	LRB Review of Arbitration Awards (Section 99)	8
11.	Reconsideration of Board Decisions (Section 141)	9
12.	Expedited Arbitration (Sections 104, 105)	10
13.	Deadlines for certain LRB processes (Sections 5(2), 99, 141)	11
14.	Fees for LRB Services	11
15.	Strike Vote Supervision	12
16.	Privatize Mediation Services	12
17.	Reduce use of LRB 'Members'	13
18.	Partial Decertification	13

1. Definition of Picketing

Current status:

"Picketing" is defined under the *Labour Relations Code* as:

> Attending at or near a person's place of business, operations or employment for the purpose of persuading or attempting to persuade anyone not to
>
> (a) enter that place of business, operations or employment,
>
> (b) deal in or handle that person's products, or
>
> (c) do business with that person,
>
> and a similar act at such a place that has an equivalent purpose;

Issues:

In a case before the Supreme Court of Canada in 1999, it was decided that the *Labour Relations Code* definition of "picketing" could not prohibit consumer-leafleting activity protected by the *Charter of Rights and Freedoms*.

Options for Discussion:

Government needs to amend the current language on picketing. One approach is to restore the definition of picketing and state that it excludes "consumer leafleting."

It has been suggested that consumer leafleting would then be described in one of the following ways:

1. "Consumer leafleting" means the communication of information regarding a dispute for the purpose of persuading or attempting to persuade a consumer to boycott a product or a business, or for an equivalent purpose.
2. "Consumer leafleting" means the distribution of lawful, accurate written information about a labour dispute to persuade potential consumers to boycott a product or a place of business, operations or employment, where:
   a. the information does not encourage or entice the commission of unlawful or tortious acts and is not misleading or defamatory;
   b. the information is distributed in a manner which is not coercive or intimidating and which does not impede access to or egress from the leafleted premises; and
   c. the distribution of the information does not have the purpose or effect of preventing employees of the leafleted entity from working or interfering with the contractual relations between the leafleted entity and third parties.

Stakeholder Views:

Stakeholders disagree on definition of "consumer leafleting".

Employer representatives generally prefer definition #2 because it more specifically delineates what constitutes legal consumer leafleting.

Labour representatives, in discussions last year, advocated a more expansive definition of consumer leafleting.

Key Considerations:

The Code may be vulnerable to challenge under the *Canadian Charter of Rights and Freedoms* if the definition of leafleting is too narrow.

Flexibility of definition #1 would permit the LRB to establish rules for picketing and leafleting that would be consistent with court rulings.

Definition #2 would be more explicit as it paraphrases the Supreme Court decision.

2. Definition of Manager

Current Status:

Under the Labour Relations Code, employees are entitled to trade union representation. The Code defines an employee as not including a person who:

a. Performs the functions of a manager or superintendent, or

b. Is employed in a confidential capacity in matters relating to labour relations or personnel.

Issues:

Concerns have been raised that in recent years, the LRB has reduced the scope of manager functions to include only supervisors who have the right to hire and to fire employees.

Options for Discussion:

It has been suggested that persons who are integrated into a "management team" and not just those who hire/fire, should be excluded from the bargaining unit.

Stakeholder Views:

Trade unions generally seek "all employee" bargaining units and prefer not to see persons who seek trade union representation be excluded from the bargaining unit.

Employers believe that the management team concept is necessary and it includes persons who do not hire/fire.

Key Considerations:

Ensuring the right to trade union representation is not overly restricted.

Ensuring the employer can properly manage its operations and that "managers" are not placed within the bargaining unit.

3. Purpose of the Code (Section 2)

Current Status:

The current purposes of the Code are set out in Section 2(1). Section 2(2) of the Code required the LRB to exercise the powers and perform the duties conferred or imposed on it having regard to these purposes.

Issues:

It has been suggested that the purposes section should recognize employee rights and competitiveness and give more explicit recognition to the Purposes section in interpreting other sections of the code.

Options for Discussion:

The following incorporates proposals from a number of sources to change the existing purposes section of the Code (Section 2). Additions to the existing purposes are in ***bold italics***.

2(1) ***The board and other persons exercising authority conferred by the Code must exercise the powers and perform the duties conferred or imposed on them under this Code in a manner that:***

a. ***recognizes the rights and obligations of employees, employers and trade unions under the Code;***

b. ***fosters the employment of workers in a productive and competitive manner;***

c. ***facilitates*** the practice and procedure of collective bargaining between employers and trade unions as the freely chosen representatives of employees;

d. encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and promoting workplace productivity ***and competitiveness;***

e. minimizes the effects of labour disputes on persons who are not involved in the dispute;

f. promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and trade unions;

g. ensures that the public interest is protected during labour disputes;

h. encourages the use of mediation as a dispute resolution mechanism.

Stakeholder Views:

Employer representatives suggested the above changes, particularly the added recognition given to workplace competitiveness.

Key Considerations:

The changes to the introductory statement may result in the Purposes section amending the interpretation of other sections of the Code.

Explicit recognition of employee rights with the rights of employers and trade unions may also affect the interpretation of other sections of the Code.

4. Review of the Code (Section 3)

Current Status:

Section 3 of the Code permits the Minister to appoint a committee of special advisers to undertake a review of the Code and labour management relations. Such committees can also be asked to:

- Make recommendations concerning the need for amendments to the legislation; and
- Make recommendations on any specific matter referred to the committee by the Minister.

Issues:

Two specific requests have been raised:

1. Given the possibility of significant implications of Code changes, a tri-partite committee of special advisors should be set up to review the suggested changes to the Code and make recommendations to the Minister.
2. In the recent past, three major public sector groups have been unable to reach agreement after months of bargaining and work disruption: nurses/paramedical professionals, Lower Mainland transit and teachers. These disputes were settled through legislation. A formal review of public sector bargaining should be undertaken.

Options for Discussion:

The implementation of Section 3 and not its amendment. The following questions are provided for discussion purposes:

- Is a more structured process required to provide recommendations for labour relations law reform?
- What sort of structure would support overall labour relations stability and address specific labour relations challenges facing the public sector?

Stakeholder Views:

The trade union community notes that the introduction of the *Labour Relations Code* in 1993 followed a lengthy public review by a tri-partite committee. The B.C. Federation of Labour asks that a similar process consider suggested changes.

Employers, trade unions and the community recognize the lack of success in public sector collective bargaining. Various reasons are given. A consultation process would review public sector collective bargaining structures, practices and procedures and make recommendations to the Minister.

Key Considerations:

It is desirable to have a legislative framework that encourages employers, employees and trade union rights in the code.

Public sector bargaining disputes often involve essential public services. It is in the public interest to have efficient and effective collective bargaining.

Right to Communicate (Section 8)

Current Status:

Section 8 of the Code currently reads:

> "Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business."

Issues:

Some employers argue that the Code unduly restricts the right of employers and employees to communicate, especially during certification and decertification drives.

There are also concerns that the restrictions in current language of Section 8 may be vulnerable to a Charter challenge.

Options for Discussion:

Some stakeholders have suggested the following rewording of Section 8:

> "Nothing in this code deprives a person of the freedom to express his or her views on any matter, including matters relating to an employer or a trade union, provided he or she does not use intimidation, coercion or threats."

It has also been suggested that amendments be made to the Code and the Regulations respecting certification and de-certification to permit a pre-vote meeting with members of the unit, prior to a representation vote. Upon an application to the Board:

- Permit either party (the employer or the union) to decide that they want to make a presentation to employees affected by the outcome of the vote within 48 hours of when the vote is scheduled.
- The employer will inform the LRB of a convenient time and location for the meeting.
- Employee attendance at the meeting is voluntary if the meeting held outside of company time and location.
- The union (or the employer) is entitled to attend the meeting and respond to comments made by the other party.
- A person designated by the LRB would also attend the meeting and act as moderator.
- The moderator would ensure:
  - Equal time for employer and union to speak.
  - Adequate opportunity for questions and answers.
  - Questions could be asked without revealing employee identity.
- This person would make a report to the LRB respecting the discussions taking place at the meeting.
- Statements made at the meeting are subject to Section 8 of the Code.

The cost of attendance by a Special Investigation Officer or another person appointed by the Board would be $500. The cost would be shared if the employer's union's business representatives attend the meeting.

It has further been proposed that this option for either party to request a formal supervised meeting with members of the bargaining unit should also be available in situations involving the use of a Final Offer Vote pursuant to Section 78.

Stakeholder Views:

Employer representatives feel strongly that the suggested changes respond to their concern that employers should have a balanced right to communicate with their employees.

Key Considerations:

Balancing the rights of employers and unions to communicate with the employees.

Preventing unfair labour practices that involve intimidation, coercion or threats.

6. Duty of Fair Representation Complaints (Sections 12 & 13)

Current Status:

Section 12 imposes a duty of fair representation on unions, trade union councils and employers' organizations.

Issues:

Section 12 helps ensure that unions and trade union councils treat all bargaining unit employees fairly, and employer organizations treat all employers in the group fairly.

The LRB deals with approx. 200 duty-of-fair-representation complaints each year. Most complaints are from employees concerning the representation provided by their unions.

Typically, fewer than 5 percent of these complaints are found to have merit.

Some complainants, especially employees, say that Section 12 complaint resolution process is too narrow.

Options for Discussion:

Two different options have been suggested for dealing with the current provisions respecting complaints respecting the duty of fair representation.

1. One suggestion is that Sections 12 and 13 be dropped from the Code, and that complaints respecting the treatment of a union member by a trade union be resolved by complainants proceeding directly to the courts.
2. An alternative suggestion is to streamline the process for the affected parties and the LRB, by giving the LRB more discretion to use procedures other than formal adjudication to process a Section 12 complaint where appropriate. Possible alternative procedures could include referral to and adjudication by:
   - The Employment Standards Tribunal adjudicators
   - The LRB Mediation Division mediators
   - A settlement conference
   - A read and review process
   - A brief "inquiry" hearing
   - Mediation/arbitration by a special investigating officer.

   As another streamlining initiative, the Code could be amended to specify a time limit for filing a Section 12 complaint. While the Code is silent at present, LRB policy is currently 1 year. It has been suggested that such complaints be filed within six months.

Stakeholder Views:

There is broad support for the LRB to have the authority to streamline the Section 12 complaint resolution process.

Some individual's support making the resolution of Duty of Fair Representation a matter for the courts.

Key Considerations:

Balancing employees' and employers' right to fair representation and a just "opportunity to be heard", with the best use of LRB resources.

Revocation of Bargaining Rights (Section 33)

Current Status:

The existing Section 33 permits the revocation (decertification) of recognized bargaining rights of a trade union for a variety of reasons.

Issues:

While the Code permits decertification after an employer has ceased to be an employer of members of a bargaining unit, no time limit is specified.

Options for Discussion:

It has been suggested that an employer should be able to make an application for decertification if the business of the employer has not been active for a period of two years.

Stakeholder Views:

This change was proposed by certain employers on the basis that a two-year closure or hiatus of the business demonstrates a closure of operations that should be recognized within the Code.

Key Considerations:

Decertification would not be a matter for employees to decide.

Employees hired by a business after its closure and decertification would still have the right to unionize and negotiate a collective agreement with the new employer, if that is their wish.

Successorship Rights (Section 35)

Current Status:

The existing Section 35 provides that when a business is sold, leased or transferred, the purchaser, lessee or transferee is bound by any existing collective agreement and any proceeding under the Code.

Issues:

Successorship currently applies in the case of a company sold in bankruptcy.

Options for Discussion:

It has been suggested that the successorship rights and obligations under Section 35 should not apply if the business is sold, leased or transferred by a trustee under the *Bankruptcy and Insolvency Act*, unless the LRB is satisfied that the employer is attempting to evade collective bargaining obligations.

Stakeholder Views:

It was suggested that this amendment would make it easier to sell a bankrupt business in its entirety to potential investors, thereby maintaining the business and future employment.

Key Considerations:

Decertification would not be a matter for employees to decide.

Employees hired by the revived business sold through a bankruptcy would still have the right to unionize and negotiate a collective agreement with the new employer, if that is their wish.

9. Essential Service Designation (Section 72)

Current Status:

Prior to a strike or lockout, a party can request that the LRB decide the possible dispute would affect essential services, and that the level of essential services be designated.

The LRB provides mediation services to help the parties reach an agreement on the essential service designations.

The LRB adjudicates and makes a ruling on any issues to which the parties could not agree.

Options for Discussion:

It has been suggested that the Code could be amended to permit the LRB to appoint a mediator or Special Investigating Officer with the authority to mediate and adjudicate essential service designation.

Stakeholder Views:

There was considerable support for this suggestion.

Giving a mediator the statutory right to also adjudicate was questioned.

Key Considerations:

An efficient and expeditious process is necessary for essential service designations.

10. LRB Review of Arbitration Awards (Section 99)

Current Status:

Under the existing Section 99, a party affected by the decision of an arbitration board may appeal the decision to the LRB on grounds that either the party was denied a fair hearing, or that the decision of the arbitration panel was inconsistent with the Code or another Act dealing with labour relations.

Issues:

BC is the only province in which arbitration decisions are reviewed by the respective Labour Relations Board, rather than the courts.

Options for Discussion:

Should Section 99 be repealed from the Code and issues related to arbitration decisions be appealed directly to the courts?

Stakeholder Views:

Many employer representatives and arbitrators support keeping the current Section 99 review. The LRB is recognized as having more expertise to address labour relations matters and is less expensive than the courts.

Some people suggested that BC should be consistent with other provinces and arbitration decisions should be appealed directly to the courts.

Key Considerations:

Appeals to the courts would be more expensive but that may reduce the number of appeals.

This change would free up LRB resources to deal with other matters.

1. Reconsideration of Board Decisions (Section 141)

Current Status:

Section 141 permits the LRB to reconsider a decision of a panel of the LRB upon application by one of the affected parties. This reconsideration power ensures consistency of Board policy and interpretation of the Code.

Issues:

Reconsideration within the LRB is costly and time consuming.

Options for Discussion:

It has been suggested that the current reconsideration powers be reduced. The two most commonly proposed areas for elimination of reconsideration powers are:

- A trade union's Duty of Fair Representation (Section 12).
- If Section 99 is not repealed, LRB decisions respecting an arbitrator's award (Section 99).

Stakeholder Views:

Many stakeholders support curtailing some reconsideration powers of the LRB in the two areas outlined above.

Key Considerations:

The LRB's reconsideration powers ensure consistency of LRB policy direction in decisions.

Section 99 is an appeal of an arbitrator's award. Another appeal may assist in consistency but may not be necessary.

12. Expedited Arbitration (Sections 104, 105)

Current Status:

Under Section 104, a party to a collective agreement may apply to the Collective Agreement Arbitration Bureau (CAAB) to have a grievance resolved by expedited arbitration, over-riding existing grievance arbitration provisions of their collective agreement.

Under Section 105, the parties may agree to refer one or more grievances to a single mediator-arbitrator for resolution in an expeditious and informal manner.

Issues:

Currently, the parties cannot bargain out of Section 104 to negotiate their own expedited arbitration process.

Options for Discussion:

Various proposals have been made for Sections 104 and 105. These include:

1. Eliminate Sections 104 and 105 from the Code and allow the parties to negotiate their own expedited arbitration process.
2. Alternatively, if these provisions remain in the Code, it has been suggested that they be amended in one or more of the following ways:
   - Decisions of arbitrators (Section 104) or mediator-arbitrators (Section 105) shall be without precedent for future interpretation or application of the collective agreement, unless the parties agree to make them so;
   - Section 104 would apply unless a provision in the collective agreement provides that Section 104 does not apply; or,
   - As a variation on the previous proposal, Section 104 would only have application once the parties bargained it into their collective agreement.

Stakeholder Views:

Each of the above proposals drew support from different stakeholders.

Key Considerations:

Dispute resolution through an expedited arbitration has a positive labour relations result.

The employer and the union should decide on the expedited process and the arbitrator rather than have both imposed by the Code.

.Deadlines for certain LRB processes (Sections 5(2), 99, 141)

Current Status:

Under the Code and LRB Rules, there are a number of deadlines that are based on "calendar days" and not "working days" (i.e. Monday to Friday). For example, s.5(2) – unfair labour practice; s.99 and Rules 28(1)(a) and 28(1.1)(b) – appeal of arbitration awards; and s.141(5) &(6) and Rules 29(1)(a) – application for reconsideration of LRB decisions.

Issues:

It is not always possible for parties and the LRB to complete required actions or, in some cases, obtain legal advice within statutorily required calendar days.

Options for Discussion:

It was suggested that the Code and LRB Rules be amended to refer to "working days" rather than "calendar days" for the above deadlines.

Stakeholder Views:

Employer representatives support change to "working days".

Key Considerations:

Would this change provide more flexibility and clarity to LRB and parties without an impact on parties' rights?

4. Fees for LRB Services

Current Status:

Fees are not currently charged to the parties for using the LRB adjudication and mediation services.

Issues:

Fees might assist in reducing unnecessary use of LRB resources.

Options for Discussion:

It has been proposed that the introduction of fees at the LRB might ensure the efficient use of LRB services. Suggested areas for fees include:

- Fees for filing all or certain applications or complaints with the LRB
- Fees for the provision of LRB mediation services

Stakeholder Views:

General discussions with the labour relations community suggest that moderate and reasonable fees would have some level of acceptance.

Key Considerations:

Would fees discourage the parties from accessing the LRB when necessary to resolve disputes?

15. Strike Vote Supervision

Current Status:

A strike vote must garner 50-percent-plus-one of the votes cast by members of the bargaining unit before job action is legal.

Currently, there is no requirement that an officer of the government be present when a union conducts a strike vote and counts the votes.

Issues:

A strike vote has serious implications for the employer, the trade union and employees.

Votes for certification, decertification and final offer votes (Section 78) are government supervised.

Options for Discussion:

It has been proposed that strike votes should be supervised and verified by an independent person.

Stakeholder Views:

It was suggested that given the serious effect of a strike on the employer, the trade union and the employees an independently supervised and counted vote was useful.

Key Considerations:

- The purpose of such a vote is that the true wishes and support of employees for strike action be accurately discovered.
- It may be very difficult to have supervision at every strike vote and could increase costs significantly for the ministry/LRB.

16. Privatize Mediation Services

Current Status:

The LRB's Mediation Services Division has mediators who have been involved in virtually every sector of the economy. Such familiarity assists in their contribution in assisting parties to reach a settlement.

Options for Discussion:

Some suggestion has been made that Mediation Services could be privatized and the parties could choose a private mediator. Some parties have utilized private mediation in the past.

Stakeholder Views:

Smaller employers who do not have personnel who are experienced in collective bargaining on a regular basis have suggested that they prefer the service as currently provided.

Key Considerations:

Maintaining a free service puts pressure on the budgetary constraints of the LRB. A fee may address that issue.

Implementing a cost for mediation services might expedite the mediation process by focusing attention on the duration of the process.

7. Reduce use of LRB 'Members'

Current Status:

Members have been part of the LRB since its inception in 1972. Members representative of employers and employees sit in equal numbers on panels established by the Chair of the LRB.

Issues:

The issue arises as to whether members retain the significance to LRB panel decisions that they once did.

Reaching consensus on a three person panel takes longer, in most cases, than on a one-person panel. Length of decisions may also be shorter in the latter case.

Options for Discussion:

The question has been raised as to whether the LRB should continue to use members and/or whether their use in Board panels should be the exception rather than the norm.

Stakeholder Views:

The labour relations community is divided on this matter. Most recognize the insight members bring to a decision and the assistance they offer the vice-chair on difficult matters. Of most concern is the delay resulting from achieving consensus in larger panels. Given that the vice-chair always resolves disagreements between members, the delay is not warranted.

Key Considerations:

- The use of members under the Code does have recognized cost implications for the LRB.
- There is a recognized delay in at least some three-person panels.
- Three persons reviewing the evidence, arguments and law, can provide more carefully considered decisions of the LRB.

8. Partial Decertification

Current Status:

In the past several years the LRB has developed a different policy approach to applications involving decertification of the entire bargaining unit and decertification of part of a bargaining unit.

Issues:

In partial decertification applications, the hearing and LRB processes can be longer and more complicated.

Options for Discussion:

It has been suggested that the Code be amended to resolve any ambiguity respecting the right of employees to apply for a partial decertification.

An application for decertification results in a vote as long as the employees covered by the collective agreement remain an appropriate bargaining unit.

Stakeholder Views:

It was suggested that the refusal to hold a decertification vote in all applications for partial decertification ignores employee rights.

Key Considerations:

- Ensuring the rights of employees who continue to be represented by the trade union have a viable bargaining unit.
- The rights and choice of certain groups of employees covered by a collective agreement should be addressed.